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No. 05-546 OCT 27 2005

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IN THE
Supreme Court of the United States

MEL SCHIFF,

Petitioner,

—v.—

FRANK A. DUSEK, On behalf of himself and all others similarly
situated; HUGH DELOZIER, Dr. and Mrs.; STATE STREET BANK;
BIRMINGHAM RETIREMENT & RELIEF FUND,

Respondents,

MATTEL INC.; JILL E. BARAD; HARRY J. PEARCE; MICHAEL PERIK;
HAROLD BROWN; JOSEPH C. GANDOLFO; TULLY M. FRIEDMAN;
NED MANSOUR; RONALD M. LOEB; ANDREA RICH; WILLIAM D.
ROLLNICK; PLEASANT T. ROWLAND; CHRISTOPHER A. SINCLAIR;
JOHN L. VOGELSTEIN; BRUCE L. STEIN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May one set of class counsel and one set of lead plaintiffs simultaneously represent under Rule 23 two classes with different claims, different legal theories, different class memberships, and different class periods against the same-defendant?

PARTIES TO THE PROCEEDING

Objector-Appellant below, and petitioner in this Court, is Mel Schiff.

Plaintiffs-Appellees below, and plaintiffs-respondents in this Court, are Frank A. Dusek, Hugh L. Delozier, Mollie Delozier, State Street Bank, Birmingham Retirement & Relief Fund.

Defendants-Appellees below, and defendants-respondents in this Court, are Mattel, Inc., Jill E. Barad, Harry J. Pearce, Michael Perik, Harold Brown, Joseph C. Gandolfo, Tully M. Friedman, Ned Mansour, Ronald M. Loeb, Andrea L. Rich, William D. Rollnick, Pleasant T. Rowland, Christopher A. Sinclair, John L. Vogelstein, Bruce L. Stein.

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PETITION FOR A WRIT OF CERTIORARI

Mel Schiff ("Petitioner"), by his undersigned counsel, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The Court of Appeals did not publish its Memorandum Decision, but it is available on Westlaw at 141 Fed.Appx. 586 (9th Cir. (Ca.) July 29, 2005). The Court of Appeals' Memorandum appears in the Appendix at 3a and its Final Judgment at 1a. The District Court did not publish its opinion, which appears in the Appendix at 9a, its Findings of Fact and Conclusions of Law at 15a.

JURISDICTION

The Court of Appeals entered its judgment on July 29, 2005. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional provision at issue is the Due Process Clause of the Fifth Amendment: "No person shall be . . . deprived of life, liberty, or property, without due process of law"

The statutes at issue are Rules 23(a)(4) and 23(g)(1)(B) of the Federal Rules of Civil Procedure:

- (a) Rule 23(a)(4) states, in part: "One or more members of a class may sue or be sued as representative parties on behalf of all only if . . .

(4) the representative parties will fairly and adequately protect the interests of the class;" and

- (b) Rule 23(g)(1)(B) states: "An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class."

STATEMENT OF THE CASE

Facts

To cure its lackluster financial performance, Mattel Co., Inc., agreed to merge with The Learning Company, Mattel to be the surviving company, but negligently conducted its due diligence. The companies prepared joint proxy materials for all shareholders as of the effective date of the merger. The shareholders voted to approve the merger. Months later, Mattel discovered The Learning Company's long-standing financial problems. As soon as Mattel disclosed this information, the price of its stock plunged; and lawsuits followed.

Proceedings Below

The District Court: Counsel for both classes involved in this petition filed *Thurber v. Mattel, Inc.*, D.C. No. CV-99-10368-MRP (C.D. Cal.), a fraud class action covering a long class period, many different public statements by Mattel, hundreds of thousands of securities transactions, and a single legal theory ("*Thurber*"). They also filed *Dusek v. Mattel, Inc.*, D.C. No. CV-99-10864-MRP (C.D. Cal.) on behalf of a different class with a one day class period, a single transaction, a single document, and a different legal theory ("*Dusek*"). Other counsel filed class actions in other jurisdictions. With cases pending across the country, with all lead plaintiff/lead counsel proceedings stayed by 15 U.S.C. § 78u-4(a)(3)(B) ii),